STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 26, 2004
v	No. 240705 Oakland Circuit Court
ROBERT SINISHTAJ, Defendant-Appellee.	LC No. 99-168698-FH

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

METER, J. (*concurring*).

I concur in the majority's result but write separately to set forth my reasons for doing so and to emphasize the impact of the *Hendrick* decision on the instant case.

At the time defendant committed the underlying offense, MCL 333.7401(2)(a)(iv)[1] provided that a person delivering or manufacturing less than fifty grams of cocaine "shall be imprisoned for not less than 1 year nor more than 20 years, and may be fined not more than $25,000.00, or placed on probation for life." The dissenting judge in *People v Sanchez*, 205 Mich App 63, 65-66; 517 NW2d 259 (1994), indicated that this "disjunctive phrase on its face indicates that lifetime probation is an alternative to the fine and imprisonment portion of the above provision." The Supreme Court adopted the *Sanchez* dissent in *People v Martinez*, 448 Mich 869; 530 NW2d 748 (1995).

Therefore, the sentence for a person violating former MCL 333.7401(2)(a)(iv) was to consist of (1) lifetime probation, (2) a prison term with a minimum of one year (with a possible fine), or (3) a lesser sanction, provided that the court provided substantial and compelling reasons, under former MCL 333.7401(4), for the lesser sanction. However, former MCL 769.34(4)(b)[2] stated, in part, that if an "offense is a violation of [MCL 333.7401(2)(a)(iv)] and the upper limit of the recommended minimum sentence range is 18 months or less, the court

[1] This statute was also in effect at the time of defendant's original sentencing for the underlying offense and at the time he was sentenced for the probation violation.

[2] This statute was in effect at the time of defendant's offense, at the time of his original sentencing, and at the time of his sentencing for the probation violation.

shall impose a sentence of life probation absent a departure." Therefore, given defendant's sentencing guidelines range of zero to eleven months, the court was required, in the absence of reasons for a departure, to impose a sentence of lifetime probation on defendant at the time of his original sentence.

As noted by the majority, *People v Hendrick (On Remand)*, 261 Mich App 673, 681; 683 NW2d (2004), held that if a trial court chooses to resentence a defendant after a probation violation, the sentence must be the "sentence that was available at the time of the initial sentencing." Therefore, the court, in resentencing defendant after the probation violation, was once again required to impose a sentence of lifetime probation on defendant.

I note that this seemingly implausible result is compelled solely by the *Hendrick* Court's conclusion that "[t]he legislative sentencing guidelines apply to sentences imposed after a probation revocation." *Id.* at 684. If *Hendrick* had not reached this conclusion, then former MCL 769.34(4)(b), *which derived its import solely from the sentencing guidelines*, would not apply. Instead, the Court, no longer bound by the strictures of the sentencing guidelines, would have been free to sentence defendant to imprisonment in accordance with MCL 333.7401(2)(a)(iv). In the absence of *Hendrick*, I would have simply remanded this case for an articulation regarding whether the court, in imposing the four-month-to-twenty-year sentence, found substantial and compelling reasons (under former MCL 333.7401[4]) to depart from the one-year minimum in former MCL 333.7401(2)(a)(iv).

Given the case law as it presently stands, I concur in the majority's result.

/s/ Patrick M. Meter